IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 4, 2006 Session

STATE OF TENNESSEE, ex rel, PAUL G. SUMMERS, in his official capacity as the Attorney General and Reporter of Tennessee, and GARY MYERS, in his official capacity as the Executive Director of the Tennessee Wildlife Resources Agency, v. RICKY WHETSELL

Direct Appeal from the Chancery Court for Washington County
No. 7723 Hon. G. Richard Johnson, Chancellor

No. E2005-01426-COA-R3-CV - FILED MAY 22, 2006

The State brought an action for removal of defendant's improvements on State property. Defendant defended on the grounds the improvements were on his property and estoppel. The Trial Court granted the State relief. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Kathryn J. Dugger-Edwards, Elizabethton, Tennessee, for appellant.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor Genera, and Elizabeth P. McCarter, Senior Counsel, Nashville, Tennessee, for appellees.

OPINION

The State brought this action on March 25, 2002, seeking to enjoin Whetsell's continued "encroachment of their trailer, goat pen, dog pen, boat dock, and driveway upon the adjoining property of Boone Reservoir/Knob Creek Access Area" which is owned by the State. The Complaint alleged that on April 10, 1958, the United States, acting through the Tennessee Valley

Authority, transferred those lands to the State "for public recreation purposes for the benefit of all members of the public without distinction or discrimination." The United States reserved the right to re-enter and take possession of the property if the State did not restrict its use to public recreation. The Complaint further alleged that Whetsell acquired adjoining property on April 16, 1979, and that in 1993 it was determined that Whetsell was encroaching on the State's property. Defendant's Answer denies that any of his improvements encroached on the State's property and raised the affirmative defense of laches, and relied on Tenn. Code Ann. §28-2-106 (adverse possession) and §28-2-109 (payment of taxes for 20 years). He concluded he should be declared the owner of the land on the authority of these statutes.

Motions for Summary Judgments were filed and denied, and at trial the parties submitted numerous stipulations. Following an evidentiary hearing the Court issued a Memorandum Opinion which held that the doctrine of laches was inapplicable to the State, even though it noted the State's 44 year delay in recording its deed in Washington County, and as to adverse possession, the Court found that Whetsell had openly, notoriously, adversely, exclusively and continuously, occupied the property for more than seven years, and that he had established the first element of adverse possession. However, the second element required proof that defendant and his predecessors had held recorded title for more than 30 years, which defendant was unable to establish. The Court said that an essential ingredient of "assurance of title" required the defendant's boundary description include the area that the State was claiming, and noted that both parties presented expert testimony on this issue, but the Court found the State's expert, Glenn Shellnut's testimony "creditable and persuasive". The Court thus held that the deeds in defendant's chain of title did not contain calls that included the disputed acreage, and that defendant could not establish color of title. The Court granted the injunctive relief requested by the State.

Defendant appealed and raised these issues:

1. Whether the Trial Court erred in concluding that the deeds in Whetsell's chain of title do not contain calls that include the disputed acreage?

2. Whether the Trial Court erred in failing to consider the tax map as evidence of Whetsell's color of title?

3. Whether the Trial Court erred in failing to find that Whetsell had proven all elements of Tenn. Code Ann. §28-2-105?

Whetsell argues the Trial Court erred in concluding that the deeds in his chain of title did not contain calls that included the disputed property. He asserts that his expert's testimony regarding the boundaries of Whetsell's property was undisputed, in that plaintiff's expert, Shellnut, did not survey Whetsell's property. Shellnut testified, however, that he reviewed Whetsell's 1979 deed, which referenced 2 acres, and plotted part of it out on his survey as well. Shellnut testified that Whetsell's southern boundary line adjoined and ran along the arc he surveyed as the old railroad.

We review the Trial Court's finding of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). The Trial Court found the State's expert, Shellnut's testimony more credible, and a comparison of the experts' testimony established that Shellnut's survey to be more thorough. He utilized the TVA field notes and other reliable data which enabled him to pinpoint the boundaries with accuracy. Shellnut explained his methodology and went into great detail in showing how all of the tracts were developed and how they fit together, and his explanation was accepted by the Trial Court.

Whetsell countered that his expert's explanation regarding his placement of the boundary line was equally reasonable and should have been accepted. The case cited by Whetsell dealt with issues regarding whether a deed should be declared void for uncertainty, and did not involve a boundary line dispute. *Sheffield v. Franklin*, 222 S.W.2d 974 (Tenn. Ct. App. 1947). In cases involving boundary line disputes, the deed relied upon by the party claiming adverse possession must contain a description of the disputed property in order to give that party "color of title". *See Lemm v. Adams*, 955 S.W.2d 70 (Tenn. Ct. App. 1997); *Uhlhorn v. Keltner*, 723 S.W.2d 131 (Tenn. Ct. App. 1986); *Blankenship v. Blankenship*, 658 S.W.2d 125 (Tenn. Ct. App. 1983). In this case, the Trial Court found that Whetsell's deed did not contain the disputed property, and this finding of fact is accompanied by a presumption of correctness, unless the evidence preponderates against it. In cases where opposing expert evidence is offered, and in cases where there is no opposing expert evidence, the trier of fact "is still bound to decide the issue upon its fair judgment, assisted by the expert testimony." *Gibson v. Ferguson*, 562 S.W.2d 188 (Tenn. 1976). "Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character". *Cocke County Bd. Of Highway Comm. v. Newport Utilities Bd.*, 690 S.W.2d 231 (Tenn. 1985), *quoting* 31 Am. Jur. 2d *Expert and Opinion Evidence* §138 (1967). "Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation." *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983). Thus, the mere fact that one expert found that Whetsell's deed did contain the disputed property does not conclusively establish this as fact. The evidence does not preponderate against the Trial Court's determination, taking into account the Court's finding on the issue of credibility. The Trial Court properly determined that Whetsell had failed to establish recorded assurance of title, which is a requirement of the adverse possession statute. Tenn. Code Ann. § 28-2-105.

Next, Whetsell asserts the Trial Court failed to consider the tax map as evidence of Whetsell's color of title, even though he concedes that tax maps cannot be used to establish a boundary line pursuant to case law. He argues, however, that the tax map could be used to establish "color of title" because the tax map comports with Pierce's placement of the boundary. This is a distinction without a difference, since it does not differ from using a tax map to establish a boundary. Assuming, *arguendo* the tax map is treated as evidence, the statute requires a deed or other conveyance to establish assurance of title. *See* Tenn. Code Ann. 28-2-105. This argument, as well as Whetsell's assertions regarding estoppel are without merit.

In sum, the Trial Court properly determined that Whetsell's deed description did not contain the disputed property, and Whetsell cannot establish adverse possession pursuant to Tenn. Code Ann. 28-2-105, because he cannot show assurance of title recorded for more than thirty years.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Ricky Whetsell.

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HERSCHEL PICKENS FRANKS, P.J.